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No. 494

In the Supreme Court of the United States

OCTOBER TERM, 1935

ISAAC K. INGLIS, PETITIONER,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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No. 494

ISABEL K. DIBBLEE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 69–76) is reported in 29 B. T. A. 1070. The opinion of the Circuit Court of Appeals (R. 92–95) is reported in 75 F. (2d) 617.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 5, 1935. (R. 95.) A petition for rehearing filed March 6, 1935, was denied September 6, 1935. (R. 96.) The petition for a writ of certiorari was filed October 4, 1935, and

was granted October 14, 1935 (R. 98). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner, on certain dates extending from April 18 to December 18, 1928, sold stock which she had received as a general legatee under the will of her deceased mother, upon a distribution of the estate on May 21, 1927. The petitioner's mother died March 26, 1926. Was the stock "held" by the petitioner for more than two years, so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101 of the Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 8–14.

STATEMENT

The facts as contained in the opinion of the Board of Tax Appeals (R. 70–71) are substantially as follows: Petitioner is an individual residing at Ross, in Marin County, California. Her mother died testate on March 28, 1926, and in her will disposed of her property, leaving "All my property, real, personal and mixed, of any kind and nature whatsoever, and wherever situate, * * * unto my four children, Lucia Hamilton Kittle Sherman, Isabel Kittle Dibblee, Allen Irvin Kittle, and John

Casper Kittle, share and share alike." The will was duly probated and the estate distributed under a decree of final distribution dated May 21, 1927, the petitioner receiving one fourth of certain stocks and bonds so distributed from the estate of her mother. Thereafter and on certain dates extending from April 18 to December 18, 1928, petitioner sold some of the securities thus acquired. These sales were made more than two years after the death of her mother, but less than two years after the date of the distribution to the petitioner of the property sold. In her income tax return for 1928 petitioner reported the profit from such sales as capital net gain in the amount of $27,712.33, based on the value of the securities at March 28, 1926. The profit based on fair market value at the time of distribution is $28,441.86. Upon audit of the return the respondent included this latter amount as ordinary income and determined the deficiency in controversy.

Further it was admitted by the petitioner before the Board of Tax Appeals that the basis for determining the gain on the sale of the securities in question was the fair market value thereof as of the date of distribution to the petitioner, the basis used by the respondent in determining the deficiency here in controversy. (R. 71.)

The Board of Tax Appeals approved and affirmed the Commissioner's determination. (R. 76.) The Circuit Court of Appeals affirmed the

order of the Board (R. 95) and subsequently denied a petition for rehearing (R. 96).

ARGUMENT

PETITIONER, HAVING RECEIVED SECURITIES AS A GENERAL LEGATEE UNDER HER MOTHER'S WILL, SUCH SECURITIES WERE HELD ONLY FROM THE DATE OF DISTRIBUTION, LESS THAN TWO YEARS PRIOR TO THE SALE THEREOF, AND THE GAIN THEREFORE IS NOT A CAPITAL NET GAIN

The Circuit Court of Appeals, affirming the Board of Tax Appeals, held that the securities which were received by petitioner as a general legatee under her mother's will on May 21, 1927, the date of distribution, were "held" by petitioner only from that date within the meaning of Section 101 (c) (8) of the Revenue Act of 1928. Therefore, that portion of the securities so received which were sold between April 18 and December 18, 1928, had not been "held" for a period of two years. Consequently the gain was held to be an ordinary one rather than a capital net gain taxable at the lower and flat rate of 12½ percent. The petitioner contends that her period of holding commenced on March 28, 1926, the date of her mother's death, and that consequently the securities constituted capital assets in her hands at the time of the sale thereof. We submit that the decision below is correct and that the petitioner's contentions are erroneous.

Section 101 (c) (8) of the Revenue Act of 1928, *infra*, provides that at the election of the taxpayer

the tax on net gains from the sale of capital assets may be taxed at 12½ percent (instead of at the ordinary normal and surtax rates) and defines the term "capital assets" as "property *held by the taxpayer* for more than two years." (Italics supplied.) It is further provided that in determining the period for which the taxpayer has held property there shall be included the period for which the property was held by any other person if under Section 113 the basis for determining gain or loss on a sale of the property in the hands of the taxpayer is the same as it would have been in the hands of such other person. (Subdivision (c) (8) (B), *infra.*) Section 113 (a) of the Revenue Act of 1928, *infra,* so far as material here, provides that the basis for determining gain or loss on a sale of property *acquired* after February 28, 1913, shall be the cost thereof, with certain exceptions. Subdivision (a) (2) provides generally that if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor. Under Subdivision (a) (5) the basis prescribed for real property acquired by general or specific devise or intestacy, and of personal property acquired by an estate from the decedent, is the value thereof at the date of decedent's death. In all other cases of property acquired either by will or intestacy, however, which include general or residuary bequests, the basis specified is the value of the property *at the time of the distribution to the taxpayer.*

The securities here in question were distributed by the executor to the petitioner on May 21, 1927. Within less than two years thereafter she sold them. The sale was made more than two years after the death of the testatrix. The petitioner received the securities as a general legatee. It is not disputed that the basis for determining the gain on the sale is "the fair market value of the property at the time of the distribution to the" petitioner under Section 113 (a) (5) of the Revenue Act of 1928. The question, therefore, is whether the date for fixing the basis under Section 113 (a) (5) is also the date which marks the beginning of the period of holding under Section 101 (c) (3) of the Act. This question is now before this Court in the following cases: *McFeely* v. *Helvering,* No. 24, October Term, 1935, certiorari granted, May 20, 1935. In that case the taxpayer was a donee of a widow who elected under the laws of Pennsylvania to take against the will of her deceased husband. In *United States* v. *First National Bank of Boston,* and *Helvering* v. *Lee,* Nos. 110 and 111, respectively, October Term, 1935, certiorari granted, October 14, 1935, the taxpayers were residuary legatees. In *Ogle* v. *Helvering,* and *Rand* v. *Helvering,* Nos. 137 and 439, respectively, certiorari granted, October 14, 1935, the taxpayers took under intestacy laws.

Our reasons for urging the affirmance of the decision below in the instant case are the same as the reasons advanced on pages 12 to 35, inclusive, of

respondent's brief heretofore filed in the *McFeely* case. For the convenience of the Court, and in order to prevent repetition, we respectfully invite the Court's attention to that argument and incorporate the same herein, at this point, by reference. Copies of the respondent's brief in the *McFeely* case have been served with this brief on petitioner's counsel herein.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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OCTOBER, 1935

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 815, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other

person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) *Gift after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it

would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner:

(3) Transfer in Trust after December 31, 1920.—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired

either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

Treasury Regulations 74:

ART. 596. *Property transmitted at death.*—In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with

the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of th rticle, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

S. Rep. 960, 70th Cong., 1st Sess. (p. 26):

Accordingly, the committee has revised section 113 (a) (5) and certain related sec-

tions, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases, it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

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